# RECENT CASES.

BILLS AND NOTES — CHECK — RIGHT OF HOLDER AGAINST DRAWEE. — A check, duly indorsed, was passed through several hands, and then deposited with the plaintiff bank, who gave the depositor credit therefor, and presented it to the defendant bank, the drawee, for certification. Defendant refused to certify the check, having been notified by the drawer to stop payment. *Held*, that plaintiff was entitled to judgment for the amount of the check, and that defendant could not set up as a defence that the several transfers of the check had been without consideration, there being no proof that plaintiff was aware of any infirmity in the check. *Nat. Bank of America* v. *Nat. Bank of Illinois*, 45 N. E. Rep. 968 (Ill.).

The decision is based upon the ground that the drawing of a check upon a fund deposited in a bank amounts to an assignment of such fund to the amount of the check, and gives the holder a direct cause of action against the drawee after demand made while the drawee has sufficient funds of the drawer on hand. This doctrine has also been adopted in Iowa. *Roberts* v. *Corbin*, 26 Iowa, 315. The better view is that taken in *Hopkinson* v. *Forster*, L. R. 19 Eq. 74, holding that the drawing of a check gives the holder thereof no right of action against the drawee, and that the drawer is the only one who can sue the drawee for failure to pay to his order.

BILLS AND NOTES — INSANE MAKER. — Where an insane person gave a note for legal services in securing an inquest of his condition, *held* that there can be no recovery on the note, though reasonable remuneration may be obtained for the services. *McKee's Adm'r* v. *Purnell*, 38 S. W. Rep. 705 (Ky.).

The better view would seem to be that there can be no recovery on the note of an insane person. 1 Daniel on Neg. Inst., 4th ed., § 210. But the decisions are by no means in accord. There is authority that those contracting in ignorance of the insanity may enforce the instrument. *Lancaster Bank* v. *Moore*, 78 Pa. St. 407. And there is another view that recovery may be had on the note if it were given for necessaries, or it would seem for value. *McCormick* v. *Littler*, 85 Ill. 62. The proper way to do justice is to allow a claim, as in the principal case, for a reasonable sum, without reference to the note.

BILLS AND NOTES — NOTE PAYABLE TO TRUSTEE. — A trustee obtained notes for a consideration which wholly failed. He transferred the notes, by consent of his *cestuis*, to a purchaser for value, without notice of the failure of consideration. *Held*, that the fact that the notes were made payable on their face to him as trustee did not destroy the negotiability, nor subject the purchaser to the maker's equitable claim against the payee. *Fox* v. *Citizens' Bank & Trust Co.*, 37 S. W. Rep. 1102 (Tenn.). See NOTES.

CARRIERS — RIGHT OF CONSIGNOR TO SUE FOR LOSS. — *Held*, that a consignor cannot maintain an action against a common carrier for loss of goods without averring ownership, or some special interest in the property. *Union Pac. Ry. Co.* v. *Metcalf*, 69 N. W. Rep. 961 (Neb.).

Carriers were originally liable to the bailor only. It was a duty to answer to him from whom they had gotten possession. The owner's right to obtain the property from the bailees, without leaving him still responsible to the bailor, was a later development. Jones on Bailment, 53, note. This liability to the bailor was always *ex delicto*. The right of the bailor in contract originated in *Dale* v. *Hall*, 1 Wils. 281. In time there was a tendency to confine the consignor to his action on the contract; and now there is considerable authority to deny him even that. See cases in Hutchinson on Carriers, 2d ed., § 731. But as the weight of authority is that the consignor can sue on the contract, and can recover full value of the goods, either for himself or for the owner, whom he is supposed to represent (Id., § 727), there seems to be a recognition of his right of control over the goods which would properly give him an action on the possession in tort. *Blanchard* v. *Page*, 8 Gray, 281.

CONFLICT OF LAWS — CONTRACTS RELATING TO LAND. — Bill by the representative of a wife to enforce a covenant of the husband to surrender all his marriage interest in the wife's lands situated in Massachusetts. In that State husband and wife cannot contract; in South Carolina, where the covenant was made, the law is otherwise. Demurrer, on the ground of incapacity, overruled. *Polson* v. *Stewart*, 45 N. E. Rep. 757 (Mass.).

It was admitted that a deed surrendering the husband's rights would have been invalid, for the law of the *situs* governs such instruments. Field, C. J., dissenting, held

that the same ought to be true of a contract to convey. Such a view can be supported only on the theory that the transfer of land so closely concerns the State where it is situated that all contracts relating thereto must conform to its law. It is on this principle that actions of trespass to real property are not allowed outside of the State where the act was committed. See Story, Conflict of Laws, §§ 554, 555. But there would seem to be no advantage in holding to such a strict rule. Husband and wife are allowed in Massachusetts to bring about the result they desire by a conveyance to trustees on trusts properly limited. What is objectionable in decreeing specific performance of the same act?

CONSTITUTIONAL LAW — EQUAL PROTECTION OF THE LAW. — The State of Texas passed a statute, providing that, if a railroad corporation should fail to pay claims for less than $50, within thirty days after presentation, such corporation should be liable for an attorney's fee of $10, provided the claim was supported by affidavit and was prosecuted to a successful termination in the courts. *Held*, the statute is unconstitutional in that it denies to railroad companies the equal protection of the law. Fuller, C. J., Gray and White, J. J., dissenting. *Gulf, C., & S. F. Ry. Co.* v. *Ellis*, 17 Sup. Ct. Rep. 255.

This would seem to be an unfortunate decision. The doctrine of the United States Supreme Court in this class of cases is that class legislation is not unconstitutional so long as it rests on some reasonable basis and affects all persons alike within the sphere of its operation. *Barbier* v. *Connolly*, 113 U. S. 27; *Northern Pac. R. R. Co.* v. *Mackey*, 127 U. S. 205. This is admitted by the majority of the court, but they rest their decision on the ground that the statute in this particular case is wholly arbitrary and unreasonable. Such a view is extraordinarily narrow. The legislation in question simply concerned costs in certain civil actions, and, as is pointed out by Gray, J., in his dissenting opinion, costs have always been a legitimate subject for legislative action. See *Lowe* v. *Kansas*, 163 U. S. 81. Further than this, as there is nothing in the statute to show that the legislature was acting from wrong motives, it may well be that it appeared to that body that the railroads were unduly resisting the payment of small claims. If that were so, (and it was entirely a question for the legislature to decide,) then its action in the present case cannot be called arbitrary class legislation. Statutes to the same effect have been upheld in the State courts. *Vogel* v. *Pekoc*, 157 Ill. 339; *Cameron* v. *R. R. Co.*, 65 N. W. Rep. 652 (Minn.); *R. R. Co.* v. *Dey*, 82 Iowa, 312.

The principal case is also interesting in deciding that a corporation is a "person," within the meaning of the Fourteenth Amendment. There have been many *dicta* to that effect, but few, if any, decisions.

CONSTITUTIONAL LAW — INSURANCE POLICY — EXEMPTION FROM DEBT. — A statute providing that a policy of life insurance, in the absence of an agreement to the contrary, shall inure to the benefit of husband or wife independently of creditors, and that an endowment policy payable to the assured, on the attainment of a certain age, shall be exempt from liability for his debts, *held* to violate a constitutional provision exempting from forced sale "a reasonable amount of personal property, the kind and value of which is to be fixed by general laws." *Skinner* v. *Hoyt*, 69 N. W. Rep. 595 (N. Dak.).

This decision is a wholesome one, and, from the similarity of such exemption clauses in various State constitutions, is of considerable interest. The tendency of some of our Western legislatures has been to pass laws far too generous to debtors to be just. A comparatively recent decision to the same effect is *How* v. *How*, 61 N. W. Rep. 456 (Minn.).

CONSTITUTIONAL LAW — THIRTEENTH AMENDMENT. — The Revised Statutes provide that deserting seamen may be taken before a justice of the peace and by him committed to jail, to be delivered to the master on the sailing of the vessel, or sooner on demand. *Held*, that these provisions are constitutional. *Robertson* v. *Baldwin*, 17 Sup. Ct. Rep. 326. See NOTES.

CONTRACTS — GAMING — RECOVERY OF MONEY LOANED TO PAY LOSSES. — Where a member of a club was interested in the "take out" from all bets made in a poker game played in the club rooms, to the extent that such "take out" was used in paying for the expenses of the club and the purchase of drinks and meals for the members, *held* he is such a participant in the game, though not an actual player, as to prevent his recovery of money paid out at the request of another member in settlement of his losses at the game. *White* v. *Wilson's Adm'rs*, 38 S. W. Rep. 495 (Ky.).

In general, money loaned to pay for losses at cards, after the losses have been incurred, is recoverable. *McKinney* v. *Pope's Adm'rs*, 3 B. Mon. 93. But, as in the principal case, where the parties are *in pari delicto*, the rule is otherwise. Keener on Quasi-Contracts, 268. Although it seems rather a refinement to say that the defendant

was a participant in the game, yet the decision seems a sound one, considering the well known tendency of courts when dealing with gaming contracts. In carrying on the gaming establishment, as set out above, the parties were joint wrongdoers. *Triplett* v. *Seelbach*, 91 Ky. 30. True, the defendant was the more culpable of the two, but it is the community of interests that makes wrongdoers responsible for the whole wrong. See, on the subject of gaming contracts, Greenhood on Pub. Pol., 96 *et seq.*

CORPORATIONS — LEGISLATIVE POWER TO AMEND CHARTERS. — The legislature, under a general statute reserving a power to amend corporation charters, had authorized a lease, provided two thirds of the stockholders consented. *Held*, that the legislature could not bind dissenting stockholders. *Dow* v. *Northern R. R. Co.*, 36 Atl. Rep. 510 (N. H.). See NOTES.

EVIDENCE — ANCIENT DOCUMENTS. — Upon a deed of marriage settlement being offered in evidence, it appeared to be signed "S, per R." The deed was over forty years old. It appeared that S had power to dispose of the property in controversy among her children, as she might think right, and that the grantee in the deed was one of her children. *Held*, that although the proper execution of the deed would be presumed after the lapse of so great a time, the court would not presume that the power had been properly exercised. *In re Airey*, (1897) 1 Ch. 164.

The case is clearly right. The power was one which involved the exercise of personal discretion by the donee, and hence it could not be delegated. Farwell on Powers, 2d ed., 441. If, however, the power is merely ministerial, the general opinion seems to be that, where an ancient deed executed by an attorney is offered in evidence, the court will presume that the attorney had authority. *Doe d. Clinton* v. *Phelps*, 9 Johns. 169.

EVIDENCE — CONTRADICTION OF DYING DECLARATIONS. — *Held*, that previous statements of deceased not admissible under any of the exceptions to the hearsay rule may come in to impeach a dying declaration already admitted. *Carver* v. *United States*, 17 Sup. Ct. Rep. 228. See NOTES.

EVIDENCE — ENTRY IN THE FAMILY BIBLE. — In an action on an insurance policy, *held* that an entry of the date of birth of insured in his family Bible is admissible to show that the date given by him in his application was false, though the entry was not made by a member of the family. *Union Cent. Life Ins. Co.* v. *Pollard*, 26 S. E. Rep. 421 (Va.).

The general rule, in cases of pedigree, is that the declaration or entry should have been made by a member of the family. When the entry is made in the family Bible, however, this is not required, the presumption being that the family have adopted and given authenticity to the entries. *Moulston* v. *Atty. General*, 2 Russ. & M. 147. But the admissibility of such evidence presupposes a question of pedigree, that is, of legitimate relationship. In the principal case no such question arises, but merely a controversy as to the time of birth. Some of the American courts have a very loose doctrine as to pedigree, admitting declarations and entries of this sort whenever the time or place of birth is involved. Such evidence on these points is admissible only when they arise incidentally in a question of pedigree. The laxer doctrine is said to be traceable to the omission of this qualification (afterwards corrected) in the first edition of Greenleaf on Evidence. See Thayer's Cas. on Ev., 408, n. 1. In England, as in Massachusetts, the evidence offered in the principal case would have been excluded.

EVIDENCE — POST-TESTAMENTARY DECLARATION. — *Held*, declarations made by a testator after the date of an alleged will are not admissible to prove the execution of the will. *Atkinson* v. *Morris*, [1897] P. 40. *Held*, the contents of a lost will cannot be proved solely by the declarations of the testator. *Clark* v. *Turner*, 69 N. W. Rep. 843 (Neb).

The results reached in both cases are undoubtedly correct, but the opinions in each illustrate the persistent misconception to which the case of *Sugden* v. *St. Leonards*, 1 P. D. 154, has been subject. In each it is said that it was decided in *Sugden* v. *St. Leonards* that post-testamentary declarations are admissible to prove the contents of a will. The English court says the principle of that case does not extend to the execution of a will, and the American court that such declarations are admissible only as corroborative evidence. The truth of the matter is that *Sugden* v. *St. Leonards* decided nothing whatever with regard to post-testamentary declarations. There was direct testimony in the case, which the judges declared sufficient. The remarks made by Jessel, M. R., on the admissibility of post-testamentary declarations were therefore *dicta*. The opinion of Mellish, L. J. (at p. 251), puts the matter in its true light, in showing that such declarations have not yet been recognized as exceptions to the rule against hearsay.

EVIDENCE — PRESUMPTION OF INNOCENCE. — *Held*, a charge to the jury in a criminal case, that the defendant is presumed to be innocent of all the charges against him until he is proven guilty and that this presumption remains with him until his guilt is proved beyond a reasonable doubt, is correct, and the judge need not tell the jury that the presumption is to be regarded as matter of evidence. *Agnew* v. *United States*, 17 Sup. Ct. Rep. 235. See NOTES.

EVIDENCE — RES JUDICATA. — *Held*, where the fundamental inquiry in a suit in equity was whether plaintiff or defendant owned certain bonds, and the bill was dismissed, but the decree did not show the grounds of dismissal, the presumption is that the issue was disposed of on its merits, and the question of ownership is therefore *res adjudicata*. *Marston* v. *Evans*, 36 Atl. Rep. 258 (Md.).

The intention of the defendant was, that the opinion of the judge dismissing the bill should be consulted to discover whether the decree was dismissed on the merits of the issue or for lack of jurisdiction. But if this were allowed the court would often have to pass upon all the various shades of expression used by the decreeing judge, an inquiry which would be perplexing and unsatisfactory. The decision is barred on the broad ground that it is for the interest of the public that there should be an end of litigation. If the decree was given for lack of jurisdiction, it should have been qualified by the words "without prejudice." In the absence of such words it should be construed as what it purports to be, a decree on the merits of the issue. *Durant* v. *Essex Co.*, 7 Wall. 107.

EVIDENCE — VIOLATION OF WITNESS'S PRIVILEGE — NEW TRIAL. — A witness was erroneously compelled to testify, in spite of his claim of privilege on the ground that his evidence would tend to incriminate him. *Held*, that this is not ground for exception. *Samuel* v. *The People*, 45 N. E. Rep. 728 (Ill.).

This is supported by *Marston* v. *Downes*, 1 A. & E. 31, *Regina* v. *Kinglake*, 11 Cox C. C. 499, and the language of *Cloyes* v. *Thayer*, 3 Hill, 564, *Clark* v. *Reese*, 35 Cal. 89, and *State* v. *Foster*, 23 N. H. 348. It is true, as these decisions reason, that the privilege is purely for the benefit of the witness, and if he waives it neither party can complain. On the other hand, as the evidence here has been brought into the case in violation of a rule of law, it is hard to see how it can be "held that the verdict was supported by legal evidence." Shaw, C. J., in *Com.* v. *Kimball*, 24 Pick. 369, cited with approval in *Com.* v. *Shaw*, 4 Cush. 594, and *State* v. *Hopkins*, 23 Wis. 319.

PERSONS — HUSBAND AND WIFE — WIFE'S POWER TO ACQUIRE A DOMICIL. — A husband, domiciled in Massachusetts, abandoned his wife; the wife removed to New Hampshire intending to make her home in that State. *Held*, the wife acquired a New Hampshire domicil. *Shute* v. *Sargent*, 36 Atl. Rep. 282 (N. H.).

One who is "under the power and authority of another person has no right to choose a domicil." Story, Conflict of Laws, § 46. On marriage the wife, at common law, came under the control of the husband; she acquired his domicil. If the husband acquired a new domicil, his new domicil became that of the wife. The wife during coverture could not by her own act acquire a new domicil. It is in England an open question whether, after a judicial separation, the wife can acquire a domicil apart from that of her husband. *Dolphin* v. *Robins*, 7 H. L. Cas. 390, at p. 420.

In this country a much more liberal rule seems to prevail. It is said that the Married Women's Acts establishing the wife's right to her property free from the control of her husband, and giving to a married woman the right to contract, have changed, at least to some extent, the strict common law rule that the wife cannot acquire a domicil by her own act. *Matter of Florance*, 54 Hun, 328. The reason advanced does not inevitably lead to the result reached.

PRACTICE — NEW TRIAL — NEWLY DISCOVERED EVIDENCE. — In an action for personal injuries the plaintiff had a verdict. The defendant moved for a new trial on the ground of newly discovered evidence; (1) impeaching the plaintiff's witnesses, (2) clearly showing that plaintiff when before the jury simulated his physical condition to be worse than in fact it was. *Held*, the newly discovered evidence on the first point was not ground for a new trial, but that on the second point entitled defendant to a new trial. *Corley* v. *R. R. Co.*, 42 N. Y. Supp. 941.

The case is sound on both points. The successful party's fraud in keeping away the witnesses of the other party, or in procuring false testimony to be given, has always been good ground for a new trial. 2 Tidd's Practice, 937. Here the plaintiff's pretended injuries were false evidence calculated to mislead the jury in estimating damages. In the absence of misconduct on the part of the successful litigant the old rule seems to have been that newly discovered evidence showing one of the successful

party's witnesses to have been mistaken as to the facts testified to was not ground for a new trial. *Huish* v. *Sheldon*, Sayer, 27. But a much fairer rule now seems to prevail. If it can be clearly shown that one of the witnesses for the successful party perjured himself as to a material point, or was clearly mistaken as to the facts on which his testimony was based, a new trial will be granted. *Lister* v. *Mundell*, 1 Bos. & Pul. 427; *Richardson* v. *Fisher*, 1 Bing. 145. A clear case must be made out, however, to entitle a party to a new trial on this ground; evidence merely tending to discredit a witness's testimony does not come up to the required standard. *Holtz* v. *Schmidt*, 12 Jones & Sp. 327; *Bunn* v. *Hoyt*, 3 Johns. Ch. 255; *People* v. *McGuire*, 2 Hun, 269.

PROPERTY — APPORTIONMENT OF RENT. — Plaintiff leased to defendant land upon which were certain buildings. The buildings were destroyed by a hurricane. *Held*, that defendant is entitled to an apportionment of the rent accruing after the destruction of the buildings. *Wattles* v. *South Omaha Ice & Coal Co.*, 69 N. W. Rep. 785 (Neb.).

The court concede that this decision is contrary to the established rule of England and America; note to *McMillan* v. *Solomon*, 94 Am. Dec. 654; and is supported by only one case, *Whittaker* v. *Hawley*, 25 Kan. 674. They justify this departure from the common law largely on the ground that in interpreting contracts they are to give effect to the intent of the parties. The logical result of their reasoning, as is pointed out by the dissenting judges, would be to abrogate most of the technical rules of property and contracts. If the common law on this point has outlived its usefulness, as the court evidently believes, it should be modified by a statute, which would affect only the evil to be corrected, rather than by a decision which may prove so embarrassing a precedent.

PROPERTY — COVENANT RUNNING WITH THE LAND. — Defendant deeded certain premises to A, covenanting that the land was free from encumbrances. By mesne conveyances, the premises became vested in X. It appeared that the land was encumbered at the time of the delivery of the deed by defendant. X, the remote grantee, purported to assign to plaintiff all right of action for damages for the breach of defendant's covenant. *Held*, that, although the covenant was broken upon the delivery of the deed by the defendant, yet, under the Code allowing the assignment of choses in action, the covenant ran with the land, so that the right to sue upon it vested in X, and by his assignment in the plaintiff. *Clarke* v. *Priest*, 42 N. Y. Supp. 766.

The ground of the decision is, that as it is said in the cases that such covenant does not run with the land, because upon the delivery of the deed it is immediately broken, thus becoming a chose in action, which cannot be assigned (*Clark* v. *Swift*, 3 Met. 390), therefore, when a statute allows the assignment of choses in action it will pass with the land. This reasoning is hardly satisfactory. The better view would seem to be that the statute was intended only to cover express assignments. Even if it were extended to implied assignments, however, it seems difficult to gather from the words of a deed of land an intention to pass a chose in action.

PROPERTY — DAMAGES FOR CUTTING DOWN TREES. — An action was brought to recover damages for the cutting down and taking away of trees. *Held*, the measure of damages, where a trespasser has acted in good faith, is the value of the trees as standing timber. *Clerk* v. *Holdridge*, 43 N. Y. Supp. 115.

The court here follow the case of *Woodenware Co.* v. *U. S.*, 106 U. S. 432. *Silsbury* v. *McCoun*, 3 Comst. 379, is an analogous decision. It does not seem correct in these cases to make the measure of damages depend on the good or bad faith of the tort-feasor. A court, if it wishes to punish a defendant, should give exemplary damages; but it ought not to judge the actual loss of the plaintiff by the defendant's motive. In this class of cases, it would seem that damages should be assessed at the value of the real estate when it first becomes a chattel. Perhaps in the case of trees a plaintiff should recover their value as standing timber, whenever the trees are more valuable when standing than they can be after being cut down.

PROPERTY — FAILURE OF CONSIDERATION FOR CONVEYANCE — KNOWLEDGE BY GRANTOR THAT SUCH FAILURE MIGHT OCCUR. — When land was deeded in fulfilment of a supposed marriage contract between grantor and grantee, the long absence of a former husband of grantee being known to both parties, *held*, that the grantor's heirs cannot recover the land as deeded under a mistake of fact when the former husband turned out to have been alive. *Ogden* v. *McHugh*, 45 N. E. Rep. 731 (Mass.).

A gift by will in such a case, where there was no fraud, could not be impugned. *Giles* v. *Giles*, 1 Keen, 685. 2 Jarman on Wills, 4th ed., 53, n. And though the grantor might have refused to perform this transfer if he had discovered the fundamental error (Pollock on Contracts, 6th ed., 479), yet his voluntary completion of it, knowing that it might not be obligatory, could hardly be less binding than a gift.

PROPERTY — MORTGAGES — PURCHASE OF EQUITY OF REDEMPTION BY MORTGAGEE. — An equity of redemption was admittedly worth $45,500. The mortgagee in possession, intending to pay this sum if he could not get it for less, and knowing of the distress of the mortgagor, threatened to have the mortgage foreclosed, if the mortgagor would not sell her equity for $19,000, which she did. In an action brought to set aside the sale, *held*, that the mortgagee might purchase the equity of redemption as cheaply as he could get it. *De Martin* v. *Phelan*, 47 Pac. Rep. 356 (Cal.).

Although doubted in the earlier cases, it is now generally admitted that there is no such fiduciary relation between mortgagee and mortgagor as will preclude the mortgagee from buying the equity of redemption from a mortgagor. *Ten Eyck* v. *Craig*, 62 N. Y. 406. But that he may purchase at so great a sacrifice is an entirely different question. No authority is cited by the principal case, and there is little if any authority to be found in the books in support of the decision. Transactions of this nature should be very carefully scrutinized by the courts; and inasmuch as a mortgagee in possession may exercise an undue influence over the mortgagor, especially if the latter is in needy circumstances, it seems only just that measures to prevent any oppression of the debtor should be taken. *Pugh* v. *Davis*, 96 U. S. 332; *Oliver* v. *Cunningham*, 7 Fed. Rep. 689. The fairness of the transaction must distinctly appear; *Holdridge* v. *Gillespie*, 2 Johns. Ch. 34; and the consideration must be an adequate one. *Russel* v. *Southard*, 12 How. 154. See also Jones on Mortgages, §§ 711, 712, citing many cases *contra* to the principal case.

PROPERTY — MORTGAGES — VOID CONVEYANCE OF FULL LEGAL TITLE BY MORTGAGEE. — *Held*, that, where the mortgagee purchases the land at a void foreclosure sale, a deed by him which purports only to convey the legal title to the land has the effect of an assignment of the mortgage. *Smithson Land Co.* v. *Brantigam*, 47 Pac. Rep. 434 (Wash.).

This is one of a large class of cases in which a purchaser whose title fails or becomes worthless gets the benefit of a right of the vendor though he did not know of its existence. Several analogous cases may be mentioned. When a note secured by a mortgage is sold, the benefit of the mortgage goes with it, though unknown to the purchaser. Jones on Mortgages, § 817. The purchaser at a void tax sale gets the benefit of the State's tax lien on the land. *Reed* v. *Kalfsbeck*, 45 N. E. Rep. 476. One who buys bonds which turn out to be void is allowed to enforce the rights of the original purchaser arising from failure of consideration. *Tracy* v. *Talmage*, 14 N. Y. 162; *Irvine* v. *Comm'rs*, 75 Fed. Rep. 765. While the word assignment is often used in such cases, a more strictly logical explanation seems to be that equity will relieve from accidental loss by making the seller a constructive trustee of his rights for the benefit of the buyer. This is very closely allied to the theory of subrogation, by which the creditor is made constructive trustee for the surety.

PROPERTY — RULE AGAINST PERPETUITIES. — The testator devised land to his grandchildren, and directed that trustees should invest the residue of his estate in a house, to be built on the land whenever the city determined a certain question of grading. *Held*, that the grandchildren could elect to take the money at once, and therefore the rule against perpetuities did not apply. *In re Rogers' Estate*, 36 Atl. Rep. 340 (Penn.).

The question is similar to that considered in 10 HARVARD LAW REVIEW, 446, whether a power of sale, which trustees may exercise for an indefinite time, is without the rule against perpetuities where the equitable fee is in a class. If in the principal case there had been but one donee, the money would have been at once in his absolute control. Thus the main object of the rule against perpetuities would have been satisfied, to prevent an interest from being uncertain for a long period, and thereby much lessened in value. Gray on Perpetuities, § 269. But here to get the fund the consent of all the grandchildren must be obtained, and if there are many this may be practically impossible. But what difficulty there is is practical, not theoretical, and it would hardly seem wise to say that in every case where the gift was to more than one the rule against perpetuities should apply. No other line could be drawn in determining whether or not the interest was really in the control of each donee, and the decision of the court would therefore seem to be correct.

STATUTE OF LIMITATIONS — INTERRUPTION — WAIVER. — A legatee was indebted to his testator's estate for a sum larger than his legacy. He confessed judgment on this claim in favor of the estate. A judgment creditor of his sought to attach the property bequeathed him, on the ground that the claim upon which he had confessed judgment was barred by lapse of time, and that he had no right to waive the Statute of Limitations to the prejudice of his other creditors. It was contended by the estate that the running of the statute had been interrupted by the payment of an assignee's

dividend. It was *held*, that this last contention could not be sustained, but that no creditor could interfere to prevent his debtor waiving the Statute of Limitations in regard to other claims. *In re Sheppard's Estate*, 36 Atl. Rep. 422 (Pa.).

It has been held in England that the payment of a dividend in bankruptcy will not amount to a part payment by the debtor, so as to start the Statute of Limitations running afresh. *Davies* v. *Edwards*, 7 Exch. 22; *Ex parte Topping*, 34 L. J. Bank. 44. In this country, it has been held in *Campbell* v. *Baldwin*, 130 Mass. 199, that part payment must be voluntary, and in *McMullen* v. *Rafferty*, 89 N. Y. 456, that such payment can only be made by the debtor or his agent. The view taken in the principal case seems correct. As to the point of whether a creditor can intervene to prevent the waiver of statutory rights, it seems settled that he cannot. *Brookville Nat. Bank* v. *Kimble*, 76 Ind. 195; *Allen* v. *Smith*, 129 U. S. 465.

TORTS — LIABILITY FOR BREACH OF CONTRACT WITH THIRD PARTY. — The defendant railroad company under a through traffic arrangement delivered to the Lake Shore Railroad a car. The car was defective, — the defect being of such nature that it might have been readily discovered by a reasonably careful inspection. Plaintiff, a brakeman on the Lake Shore, was injured in consequence of this defect. *Held*, plaintiff may recover his damages from defendant. *Penn. R. R. Co.* v. *Snyder*, 45 N. E. Rep. 559 (Ohio).

This is one of a rapidly increasing line of cases in which one who carelessly furnishes a defective chattel to be used for a certain purpose is held answerable in damages to one of a class who might be expected to use the chattel, and who in using it for the purpose for which it was intended, is injured in consequence of the original defect. Another recent case of this description is *Glenn* v. *Winters*, 40 N. Y. Supp. 659. The action sounds in tort, and is totally independent of any contractual duty. The reasoning on which the liability in tort is to be supported may be found in the opinion of Brett, M. R., in *Heaven* v. *Pender*, 11 Q. B. D. 503. The liability of defendant in such cases is not, however, universally admitted. *Zieman* v. *Mfg. Co.*, 63 N. W. Rep. 1021.

If it be admitted that defendant is under a duty to that class of which plaintiff is a member to use care in providing a sound car, the intervening carelessness of a third person is immaterial, even where the careless third party is plaintiff's employer, who is himself liable in tort to plaintiff. *Moon* v. *R. R. Co.*, 46 Minn. 106.

TORTS — PREVENTING ENFORCEMENT OF DECREE. — *Held*, that an action will lie by a wife, in whose favor alimony has been decreed pending divorce proceedings, against one who has induced and aided the husband to leave the State, in order to avoid the payment of the alimony. *Hoefler* v. *Hoefler*, 42 N. Y. Supp. 1035. See NOTES.

TORTS — SUIT BY ADMINISTRATOR — CONTRIBUTORY NEGLIGENCE OF THE BENEFICIARIES. — By statute the administrator may sue, when the deceased himself might have done so. *Held*, that no damages would be given for the benefit of those beneficiaries whose negligence contributed to the accident, where the amount due each beneficiary could be respectively apportioned by the jury. *Wolf* v. *Lake Erie & W. R. R. Co.*, 45 N. E. Rep. 708 (Ohio).

The case is particularly interesting for a *dictum*, in which the court say that, if the amount must have been recovered in a lump sum, the negligent beneficiaries would be entitled to their share. The reason given is sound, namely, that it is better that the innocent beneficiaries should recover, even though the guilty get what is undeserved, rather than that the innocent should be deprived of their right because their co-beneficiaries were negligent. *Ry. Co.* v. *Crawford*, 24 Ohio St. 631. Although there has been some doubt in regard to the actual question decided in this case, (see *Wymore* v. *Mahaska County*, 78 Iowa, 396, *contra*,) the weight of authority and better opinion are in accord with this decision. *Ry. Co.* v. *Snyder*, 24 Ohio St. 670; *Penn. Co.* v. *James*, 81½ Pa. St. 194; *Williams* v. *Ry. Co.*, 60 Tex. 205; *Bamberger* v. *Ry. Co.*, 31 S. W. Rep. 163; Beach on Contrib. Neg., § 44. See also Tiffany on Death by Wrongful Act, §§ 69, 70, and 9 HARVARD LAW REVIEW, 282.

TRUSTS — LAND HELD IN TRUST TO SECURE A NOTE — CONVEYANCE BY TRUSTEE. — The owner of a piece of land executed a note, secured by a trust deed on the property. The note was for the accommodation of the payee, who paid it at maturity, and afterwards reissued it, having in the mean time acquired the equity of redemption in the land. Thereafter he conveyed the land, and also induced the trustee to join in a conveyance of the land, reciting the payment of the note, which was duly recorded. The land came by mesne conveyances to plaintiffs. At the request of the holder of the note, notice of sale under a power contained in the trust deed was given. On a bill to enjoin the sale, *held*, that the subsequent purchasers of the land took it subject to the trust for the payment of the note. *Kelly* v. *Staed*, 37 S. W. Rep. 1110 (Mo.).

The decision is clearly correct, as the trustee was not empowered by the deed or by statute to convey the land, but it suggests a practical difficulty in the use of such trust deeds for the security of money, which have almost entirely superseded mortgages in some parts of the country. Such instruments are resorted to, not only because the power of sale contained in them obviates the necessity of a suit in equity to foreclose, (2 Amer. Law Reg. N. S. 645,) but also for the ease of transfer of the notes secured by them without a formal assignment of the instrument on the record, as in the case of a mortgage. But where no power of conveyance is conferred on the trustee, any subsequent purchaser of the land, even under an apparently clean record title, takes at the peril of the trust having been satisfied and the debt duly paid, for he has notice of the trust through the deed. Where, however, the other alternative is adopted, and a statute exists, giving the trustee power to convey, or the trust deed confers such power, a *bona fide* purchaser taking under a clean record is protected, even though the conveyance was executed while the debt was still unpaid. *Porter* v. *McNabney*, 77 Ill. 235.

---

# REVIEWS.

HANDBOOK OF THE LAW OF PRIVATE CORPORATIONS. By William L. Clark, Jr. St. Paul: West Publishing Co. 1897. (Hornbook Series.) pp. xii, 729.

Like Mr. Clark's preceding work on Contracts, his new book on Corporations is a good one, — above the average of legal text-books in professed "student's series." It states the prevailing law with admirable conciseness, but, like the other "Hornbooks," it is almost entirely devoid of discussion of principle or suggestions of doctrine, things one would think quite necessary to a student. For instance, the statement that most courts hold would-be incorporators who have failed to become a corporation as partners, ought to receive more criticism than an acknowledgment that some courts do not. The section devoted to the "trust fund" theory is a happy exception to this defect, and the author's comment on the decisions here is very satisfactory.

It is refreshing to read Mr. Clark's positive statement that the rights of *de facto* corporations do not rest on the overburdened doctrine of estoppel. One is surprised after this to find estoppel invoked to account for corporate rights under partly performed *ultra vires* contracts. Accurate critics have pointed out that an individual defendant has in no wise misled a plaintiff corporation in regard to its own charter powers, and that no proper estoppel can therefore exist.

In common with other more pretentious works on the subject, the topic of the liability of assenting corporators for torts or *ultra vires* contracts of a corporation has been entirely ignored. The effect of stock subscriptions is well treated by the author. Appended to the text is a brief essay by Benjamin Trapnell, on "The Logical Conception of a Corporation," that is well worth reading. The very rational view taken of the "artificial person" is that "corporate 'identity,' in spite of changes in component parts, means simply the persistence, unchanged in point of proportion or remedy, of all rights and liabilities existing between the several members of the association, and between them and third persons." J. P. H.